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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 12
EWH/cv

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Professional Product Research, Inc.
v.
Body Balancing Ltd.

Opposition No. 113,363
to application Serial No. 75/362,486
filed on September 24, 1997

William H. Cox of Janvey Gordon Herlands Randolph Rosenberg
& Cox, LLP for Professional Product Research, Inc.

Grace Apfel for Body Balancing Ltd.

Before Hanak, Bucher and Chapman, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Body Balancing Ltd. (applicant) seeks to register in
typed drawing form BODY BALANCER for "health care devices,
namely, boards for the back for use in therapy and pain
relief." The intent-to-use application was filed on
September 24, 1997.

Professional Product Research, Inc. (opposer) filed a notice of opposition alleging that prior to September 24, 1997 it both used and registered the virtually identical mark BODY BALANCERS in connection with heel insert pads. Opposer further alleges that both its goods and applicant's boards for the back for use in pain relief "are both intended to relieve bodily discomfort and are likely to move within the same channels of trade and be purchased by the same class of purchasers." (Notice of opposition paragraph seven). Finally, opposer alleges that the contemporaneous use of opposer's mark for opposer's goods and applicant's mark for applicant's goods will "cause confusion or deceive purchasers in the mistaken belief that the goods of applicant emanate from, are offered for sale, or are sold by opposer or under opposer's approval, sponsorship or control." (Notice of opposition paragraph seven).

Applicant filed an answer which denied the pertinent allegations of the notice of opposition including those contained in paragraph seven.

Opposer made of record evidence and filed a brief. Applicant did neither. Neither party requested a hearing.

At the outset we noted that priority of use rests with opposer. Not only has opposer properly made of record a certified status and title copy of its Registration Number 1,947,339 for the mark BODY BALANCERS and design (shown

below) for "heel insert pads," but in addition the record clearly demonstrates that opposer has continuously used since February 1995 not only its registered mark but also the mark BODY BALANCERS per se for heel insert pads. In this regard, reference is made to page 14 of the testimony deposition of Daniel Feldman, opposer's Director of Marketing.

In any likelihood of confusion analysis, two key considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to cumulative effect of differences in the essential characteristics of the goods and differences in the marks.")

Considering first the marks, applicant's mark BODY BALANCER and opposer's unregistered mark BODY BALANCERS

are, obviously, virtually identical in visual appearance, pronunciation and connotation. Thus, the first Dupont "factor weights heavily against the applicant" because the two word marks are almost identical. In re Martin's Famous Pastry Shoppe Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Turning to a consideration of opposer's goods and applicant's goods, we note that because the marks are almost identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

However, the record in this case demonstrates that opposer's goods and applicant's goods are clearly related in that they are advertised in the same publications; they travel in the same trade channels; they are sold to the same customers; and they serve the same purpose, namely, to relieve back pain. With regard to this latter point, applicant's chosen description of goods is as follows: "health care devices, namely, boards for the back for use in therapy and pain relief." (Emphasis added). As for opposer's heel insert pads, Mr. Feldman testified that these pads relieve pain not only in the feet and legs, but also in the back (Feldman deposition page 15). Attached as

exhibit two to Mr. Feldman's deposition is one of opposer's BODY BALANCERS heel insert pads enclosed in its normal packaging. This packaging states that BODY BALANCERS heel insert pads distribute "weight equally thereby reducing pressure to the ankles, feet, legs and back." (Emphasis added). The text in the packaging also notes that BODY BALANCERS heel insert pads "are guaranteed to help relieve back and leg pain." (Emphasis added).

In short, given the fact that the marks of the parties are virtually identical and the fact that the goods of the parties serve the same purpose, we find that there exists a likelihood of confusion. Our determination of likelihood of confusion is only enhanced by the fact that, as previously noted, both set of goods are advertised in the same publications; travel in the same channels of trade; and are used by the same individuals.

Decision: The opposition is sustained.